to Foo. Equally when the appellants received from Foo the $664,000 part of which amounting to $116,746.44 were moneys obtained by Foo from prospective agents of the company, it seems to me that the company did not become entitled to recover the $116,746.44 from the appellants. These two sums of $80,000 and $116,746.44 were never moneys of the company nor were they moneys which the company could recover from the appellants as moneys had and received by the appellants to the use of the company. At the time Foo received these moneys from prospective agents of the company and at the time Foo paid them to the appellants there was no evidence, and indeed the evidence would indicate the contrary, that Foo had done any act acknowledging to the company Foo's readiness to pay to the company any part of the moneys he had received from these prospective agents. At the time these payments were made by Foo to the appellants it was not in dispute that Foo stood in no fiduciary relationship to the company. On these facts whatever rights, if any, the company had in respect of these moneys in relation to Foo with which we are not concerned in this appeal, there is clearly no basis for a finding of liability under section 267(1) as against the appellants.

The plain fact of the whole matter is that Foo, either on the suggestion of one or some or all of the appellants or on his own initiative, had obtained from these gullible prospective agents large sums of money which he then proceeded to use for his own purpose, namely to buy from the appellants the entire interest in the company. The fact that the appellants were also directors of the company at the time Foo obtained these moneys from these prospective agents and at the time when Foo paid them the deposit and the balance of the purchase price for their shares in the company which they had sold to Foo and that they knew the manner in which Foo had obtained these moneys is not sufficient in law to make them liable under section 267(1) and in the result I would allow this appeal in respect of the sum of $196,746.44.

Barakbah C.J. (Malaya) and **Tan Ah Tah F.J.** concurred.

Appeal partly allowed.

Solicitors: *Shook Lin & Bok; Shearn, Delamore & Co.*

RE B. NAIDU

[R.Cr.J. (Ong J.) September 24, 1964]

[K.L. — Criminal Revision No. 18 of 1964]

Criminal Procedure — Trial — Court must hear both sides — Disposal of case ex parte.

Employees Provident Fund Ordinance, 1951, s 16A (1) & (4) — Payment of contribution — Habitual defaulter — Accumulated arrears — Sentence.

It is imperative at all criminal trials that the court should hear both sides. It is the duty of the court not only to hear the defence but also the prosecution. There should be no justification for disposing of any criminal case *ex parte* except in those where a defendant is permitted to plead guilty by letter.

CRIMINAL REVISION.

Nik Zahir (Deputy Public Prosecutor) for the Public Prosecutor.

Defendant in person.

Ong J.: This matter was brought to my notice by the deputy public prosecutor for revision. The defendant failed on October 14, 1963 to appear before the magistrate, Kuala Lumpur on a summons charging him with two offences under section 16A(1)(c) of the Employees Provident Fund Ordinance, 1951. A warrant of arrest was thereupon issued and the date of trial postponed to December 11, 1963. When the prosecuting officer of the Ministry of Labour duly appeared in court on December 11, 1963, he learned to his surprise that on October 15, 1963 the defendant had surrendered himself to the court, pleaded guilty to the charges and was convicted and sentenced to a fine of $50 on each charge. The prosecution was at no time informed in advance that the case was going to be disposed of and therefore had no opportunity of acquainting the magistrate with facts which undoubtedly were material as affecting the sentence.

It is imperative at all criminal trials that the court should hear both sides. It is the duty of the court not only to hear the defence but also the prosecution. In this case there undoubtedly were serious aggravating circumstances which the learned magistrate could not and should not have ignored in passing sentence, namely, (a) the defendant had been a habitual defaulter in respect of other contributions in spite of repeated reminders and (b) a certificate under section 16A(4) would have been produced by the prosecution that the defendant was owing accumulated arrears amounting to no less than $1,472.

I accordingly called up this case for revision when the certificate of arrears was produced and the aggravating circumstances of this case were admitted by the defendant. I considered it pointless to refer the matter back to the learned magistrate and I have accordingly set aside the order of the court below and instead thereof I have substituted a fine of $150 on each charge and directed that the arrears certified due be recovered as provided by section 16A(4) in the event of payment not being made within 30 days.

I would impress upon all magistrates that there should be no justification for disposing of any criminal case *ex parte* except in those where a defendant is permitted to plead guilty by letter.

Order accordingly.